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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MILLENIUM PROPERTIES, INC., Plaintiff and Respondent, v. ROBERT EARL DANIEL ROSE, Defendant and Appellant.	B270189 (Los Angeles County Super. Ct. No. BC544344)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Lippitt, Judge. Affirmed.

Law Office of Bruce Adelstein and Bruce Adelstein for Defendant and Appellant.

Joseph West for Plaintiff and Respondent.

SUMMARY

Plaintiff Millenium Properties, Inc., is an investment firm that purchases options on residential properties for purposes of profiting from the resale of the properties. Gregory Falvo is plaintiff's majority owner and sole officer and director, and is also a licensed real estate agent. Defendant Robert Earl Daniel Rose signed an agreement with plaintiff giving plaintiff an option to purchase defendant's home for $777,777. Mr. Falvo and defendant also signed a "residential listing agreement" so that plaintiff could "provide additional exposure for the property" if plaintiff chose to do so.

When plaintiff obtained a purchase offer from a third party for $875,000, plaintiff sought to exercise its option, but defendant refused. Plaintiff sued defendant for breach of the option contract. At the court trial, defendant took the position that he did not understand what he had signed; he thought he was signing a "multiple listing"; the option agreement was "hidden amongst" other documents; he did not read the documents; and he thought he had hired Mr. Falvo to sell his house "for as much as he could get" in return for a commission.

The trial court entered judgment for defendant including damages of $66,535.50, and defendant appealed. We affirm the judgment.

FACTS

We recite the facts in the light most favorable to the judgment.

Defendant owned a home on Ethel Avenue in Sherman Oaks. Plaintiff subscribes to a service that provides "lead[s]" to plaintiff about homeowners who want to sell their property (usually owners "looking for a quick offer or some way to liquidate the property quickly"). Defendant provided information

to the service, which conveyed it to plaintiff. Mr. Falvo called defendant, asked him questions about the property, and arranged a meeting.

Defendant and Mr. Falvo met at the property on February 20, 2014. Mr. Falvo told defendant that he was president of Millenium, that "we're an investment firm," and he showed defendant "some information on our track record." He told defendant that Millenium "may be purchasing the property" and he was "looking at it as an investment." Mr. Falvo told defendant that "we either buy it or we resell it to a third party, if we choose to, because obviously, it's an option, we don't have to exercise it. The goal is to get him his money as quickly as possible. We get the overage, whatever that might be."

Mr. Falvo and defendant "went over this Option to Purchase Agreement" and discussed "giving the option to Millennium." They "definitely" had "a discussion about that there might – the optionee, Millennium, may procure another buyer." Mr. Falvo "filled out all the material terms and then [they] both signed the agreement . . . ." The agreement is between Millenium Properties, Inc., as optionee (buyer) and Mr. Rose as optionor (seller). The agreement identifies the property, provides a total purchase price of $777,777, sets the term of the option at 90 days, and states that Mr. Falvo is a licensed California realtor. Defendant acknowledged receipt of $10 in cash as a binder deposit.

Defendant also signed two other documents on February 20, 2014. One was an "Addendum to Option to Purchase Agreement" between plaintiff and defendant. In the addendum, defendant warranted the total of the encumbrances against the property (medical liens of $485,000 and current taxes due of $5,000). The addendum further provided: "If the Optionee

produces a bonafide written contract of sale to a buyer obtained by the Optionee, prior to the expiration of this agreement, the term of this agreement will be extended until the close of escrow or default of said contract. This extension will not exceed 90 days."

The other document defendant signed was a "Residential Listing Agreement" giving Devanhaar Real Estate (as broker) the exclusive right to sell the property. The printed form provided a six percent commission, but the handwritten additional terms specified: "Seller to pay no commissions." Mr. Falvo signed the listing as agent for Devanhaar Real Estate.

Mr. Falvo explained to defendant that the purpose of the residential listing agreement was "to provide additional exposure for the property if Millennium chooses to use it." Mr. Falvo discussed with defendant that "we weren't going to make any money on commission," and that "[o]ur money came from the option agreement." "That's why it [(the residential listing agreement)] says . . . 'seller to pay no commissions'." All this was explained "[f]ully" to defendant at the February 20, 2014 meeting.

Mr. Falvo made copies of the documents for defendant and then returned to his office.

Mr. Falvo procured a buyer, Amir Kohen, who made an offer to purchase the property for $875,000, using a residential purchase agreement dated March 6, 2014. Plaintiff accepted the offer on March 7, 2014, subject to a counter offer (adding terms that "property sold as-is" and "subject to closing concurrent escrow").

Mr. Falvo then called defendant and told him plaintiff "wanted to proceed and exercise the option." (Mr. Falvo could not remember the exact date, but said, "All I know is when I have an

agreement like this, I notify them [(defendant)] as quickly as possible.") Defendant refused. According to Mr. Falvo, "He pretty much cut into me and said, 'Well, I've been talking to some people. They don't like what you're doing. I don't like what you're doing, and I'm not going to work with you.' And he [(defendant)] hung up the phone on me." Mr. Falvo tried to call defendant "several times," but "he would either hang up or scream obscenities." Defendant "didn't communicate with [Mr. Falvo] at all after that."

Nancye Woodward, a senior escrow officer for Park Place Escrow, Inc., who worked with investment clients, prepared supplemental escrow instructions on April 10, 2014, for a sale of the Ethel Avenue property by defendant to plaintiff. The transaction was not completed; Ms. Woodward received an e-mail notice from Mr. Falvo that defendant had canceled.

Ms. Woodward also prepared supplemental escrow instructions on April 10, 2014, for a sale of the property from plaintiff to Mr. Kohen. That escrow was opened, and Mr. Kohen deposited $26,250 into escrow for that transaction.[1] That transaction was not completed because it was subject to the concurrent acquisition of the property by plaintiff, which did not occur.

The closing date in both sets of supplemental escrow instructions was on or before January 15, 2015. Ms. Woodward put that date in the plaintiff-defendant escrow instructions "to coordinate with the other escrow. I didn't put it on my own. It was definitive based on the contingency that it was needed for

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[1] Ms. Woodward testified that Mr. Kohen "was getting a portion of his deposit back . . . because [Mr. Kohen] was going to work with the city for a lot split," but "we still retained $5,000 in the escrow."

the other escrow to match the terms." All the contingencies "could have been completed well before" the January 15 date. Mr. Falvo told Ms. Woodward the transaction was cancelling about two weeks after she prepared the April 10, 2014 escrow instructions.

On May 8, 2014, plaintiff sued defendant for breach of the option agreement.

The evidence adduced at a court trial included the facts just described. Plaintiff also offered testimony from Lisa Carr King to establish the amount of damages incurred. Ms. King testified that the damages would be the difference between the $875,000 purchase price plaintiff's buyer agreed to pay and the $777,777 option price, minus transaction fees. Plaintiff would have netted "[v]ery close to [$]70,000." The deductions consisted of "escrow fees, title fees, and county and city transfer" fees ("call it $10,000"), and commission on the second escrow of "about $20,000." Ms. King testified the transfer taxes totaled $5.50 per thousand (875 times $5.50), the commission was two and a quarter percent of $875,000, and a title policy on that contract price would typically cost "about $2,000." Ms. King summarized: "There will be basically four charges; title, escrow, transfer taxes, and commission, which I estimate to be about $30,000."

The court entered judgment for plaintiff in the amount of $66,535.50, plus prejudgment interest, attorney fees and costs.[2]

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[2] This amount ($66,535.50) is the amount plaintiff contended should be awarded in its post-trial brief to the trial court, using these figures: $97,233 (difference between contract price and option price), less these items: $2,000 (title policy), $4,812.50 (transfer taxes), $2,000 (estimated escrow fees) and $21,875 (sales commission). These calculations appear to contain errors, but the errors benefit defendant.

Defendant filed a timely appeal from the judgment.

DISCUSSION

Defendant contends we should reverse the judgment, because (1) he did not breach the option agreement; (2) plaintiff "breached its fiduciary duties to [defendant]"; (3) plaintiff failed to prove the damages awarded; and (4) the trial court erred when it refused to exclude evidence not produced in discovery. None of these contentions has merit.

1. Breach of the Option Agreement

Substantial evidence, recited above, supports the trial court's conclusion that defendant breached the option contract. Defendant's answer to this evidence appears to rest on the notion that plaintiff did not exercise the option properly, as a matter of law. He points out that the escrow instructions – which defendant never saw because he refused to cooperate *ab initio* – contained a closing date (on or before January 15, 2015) well beyond the 180-day option period that ended August 20, 2014. Therefore, defendant contends, under the express terms of the option agreement, he was "not obligated to accept this deal," and his "refusal to [enter into an extended escrow] is not a breach of the Option Agreement."

The flaw in defendant's theory lies in the facts. Defendant (by his own admission) never saw the escrow instructions until the trial. This is because he refused to work with or speak further to Mr. Falvo after Mr. Falvo informed him that plaintiff would exercise the option. (Ms. Woodward, the escrow agent, said she tried to speak with defendant, but never reached him.)

The use of the January 15, 2015 date in the proposed escrow instructions is irrelevant to whether defendant breached the option agreement. Of course, under the terms of the option agreement, defendant could have refused to agree to any closing

after August 20, 2014, but we have no basis to assume the January 15 date was inalterable. (Ms. Woodward testified that she put the January 15 date in the escrow instructions "to coordinate with the other [plaintiff-Kohen] escrow," and when asked who gave her the January 15 date for the plaintiff-defendant escrow instructions, she answered, "I don't know if it was Greg [Falvo] or the buyer's agent on the resell escrow," and "I would say both parties did [give her the January 15 date], because both parties are connected with the closings of both escrows.") The point is that defendant refused to permit plaintiff to exercise the option because, as he told Mr. Falvo, " 'I don't like what you're doing, and I'm not going to work with you' " – not because of a date in proposed escrow instructions he never saw. And Ms. Woodward testified that all the contingencies "could have been completed well before" the January 15 date.

2. The Breach of Fiduciary Duty Contention

Defendant contends plaintiff cannot recover for breach of the option agreement "because Millenium breached its fiduciary duties in numerous ways." This is a red herring. Millennium – plaintiff – is not a real estate agent or broker and owes no fiduciary duties to defendant. Mr. Falvo is a real estate agent and does have fiduciary duties to those he represents (for example, under the residential listing agreement he made with defendant), but defendant has not sued Mr. Falvo, and Mr. Falvo is not a party to this case.

Defendant's answer to this, in its reply brief, is that "[t]he undisputed facts show that Millenium and Falvo were alter egos as a matter of law." This claim was not made in the trial court, or in defendant's opening brief, and in any event there is no evidence in the record to support an alter ego claim.

Defendant asserts that legal authorities support his contention that a breach of fiduciary duty by Mr. Falvo means that plaintiff cannot recover for defendant's breach of the option agreement, citing *Rattray v. Scudder* (1946) 28 Cal.2d 214 (*Rattray*) and *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553 (*Roberts*). Defendant is mistaken.

In *Rattray*, a real estate broker was employed by the seller to find a purchaser willing to acquire the seller's property for $12,000 plus a selling commission for the broker, and "reported to [the seller] as a broker does to his principal." (28 Cal.2d at p. 220.) After the broker secured a purchaser, "he violated his fiduciary duties as a broker and by untruthful and misleading statements induced his principal to reduce the price placed upon the property [to $10,250] and to sell it to plaintiff's firm [of licensed real estate brokers]." (*Id.* at pp. 221, 219.) The broker did not reveal that the buyer was willing to pay $13,500, and made untruthful statements that he was unable to sell the property for the price seller placed on it and " 'the only way we could get [the seller] $10,000 cash would be to buy it ourselves.' " (*Id.* at pp. 221, 222.)

Nothing remotely similar happened here, and plaintiff is an investment firm, not a firm of licensed real estate brokers. *Roberts* does not help defendant either. In *Roberts*, the seller retained a licensed real estate broker as his agent to sell a shopping center. (*Roberts, supra,* 112 Cal.App.4th at pp. 1556, 1559.) The broker eventually offered to buy the property (as trustee of her family trust) for $11 million. (*Id.* at p. 1556.) While acting as the seller's agent, the broker assigned the purchase contract to a third party buyer, with the seller's consent, but refused to disclose the amount of her assignment fee ($1.2 million) or the price the buyer agreed to pay ($12.2 million,

including the assignment fee). (*Id.* at pp. 1560, 1557.) *Roberts* found the broker, "who was at all times acting as [the seller's] agent," breached her fiduciary duty to the seller by refusing to disclose to him the details of the assignment transaction. (*Id.* at p. 1557.) Again, the case is inapt; the broker herself was profiting from a transaction in which she represented the seller (and also received a commission on the sale). And again, plaintiff here is an investment firm, not a broker.

In short, as *Roberts* tells us, the rule in *Rattray* is that "where a seller's agent has an option to purchase the seller's property, the agent may not find another buyer willing to pay a higher price, then exercise the option, then resell the property to the other buyer without full disclosure to the seller." (*Roberts, supra,* 112 Cal.App.4th at p. 1564.) That is not what happened here. Plaintiff had no disclosure obligation – and in any event had no opportunity to disclose the resale price or any other information about the resale – all of which was disclosed in the escrow instructions – because defendant refused to work with or speak to Mr. Falvo when he was notified that plaintiff would exercise its option.

3. Proof of Damages

Defendant contends plaintiff failed to prove it suffered any damages. He asserts there was no substantial evidence that Mr. Kohen actually accepted plaintiff's counteroffer. Defendant contends Mr. Falvo's testimony on this point was "suspicious" because he initially testified that Mr. Kohen did not sign the counteroffer, and the next day testified that he had found a signed copy of the counteroffer in his files, but did not bring it to court. Given the evidence that Mr. Kohen made a substantial deposit into escrow, it is reasonable to infer he accepted the counteroffer.

Defendant also contends damages were not proved because the escrow instructions show Mr. Kohen had the right to renegotiate the terms if the city denied approval of a lot split, and the right to cancel if plaintiff did not agree to revised terms. Plaintiff presented "no evidence that Kohen obtained the lot split or could have obtained the lot split," so, defendant theorizes, plaintiff did not prove Mr. Kohen "could have and would have completed the purchase . . . ."

We are not persuaded. Defendant cites no authority for the proposition that damages cannot be recovered under these circumstances. He cites Civil Code section 3301, which merely provides that "[n]o damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Plaintiff's damages are clearly ascertainable: there was a contract to purchase the property for $875,000 and testimony on the calculation of the damages. We see no reason to require plaintiff to present evidence that the city would have approved the lot split. Defendant presented no evidence suggesting the contrary. Nor did defendant suggest to the trial court in his closing brief that plaintiff's proof of damages was insufficient on this ground.

4. Defendant's Motion in Limine

Finally, defendant contends the trial court abused its discretion in denying his motion in limine to preclude plaintiff from presenting evidence that defendant asserts was "willfully not produced in discovery."

The background is this. Defendant served requests for production of documents on January 23, 2015. On February 23, 2015, defendant served form interrogatories, a related document request and a request for admissions. Plaintiff filed responses to the two requests for production of documents on February 27 and

March 30, 2015. Those responses consisted of objections to every request. Plaintiff also responded to the request for admissions on March 30, 2015, but did not respond to the form interrogatories.

Defendant did not file any motions to compel. Instead, on April 13, 2015, defendant filed a motion in limine. The motion asked the court to preclude plaintiff from introducing any evidence, on the ground that plaintiff "failed to respond to any discovery propounded by Defendant."

The parties argued the motion in limine more than three months later, on July 23, 2015. (The May 1, 2015 scheduled trial date had been continued.) The record does not show an express ruling, but the court proceeded with the trial and no objection was proffered when, at the conclusion of trial on July 24, 2015, counsel for plaintiff suggested that "we stipulate that all the documents that were identified will be admitted."

On appeal, defendant contends the "contract documents with Kohen, the Escrow Instructions, and the Addendum to the Option Agreement" should have been excluded, and complains of plaintiff's failure to identify Mr. Kohen and the escrow officer (Ms. Woodward) in response to his discovery requests. The failure to produce the documents and identify Mr. Kohen and Ms. Woodward in discovery, defendant says, "concealed the Millenium-Kohen transaction and prevented [defendant] from obtaining discovery about this transaction," which is "suspicious for numerous reasons."

Defendant has not established an abuse of discretion. His claim that there is "no dispute that [plaintiff's] responses were willfully false," because plaintiff objected and produced no documents, is obviously wrong and is unsupported by pertinent legal authority. Moreover, defendant admits in his opening brief that plaintiff served its trial exhibits on defendant's counsel

"[s]ometime in late April or May," and served its exhibit list and its witness list (which included Ms. Woodward) on April 24, 2015. Trial did not begin until three months later. Defendant claims he was "prevented . . . from investigating" the Kohen transaction "during discovery," but he made no motion to compel during discovery, and he does not explain why he made no effort to investigate during the months after he received the requested documents. Under these circumstances, we see no abuse of discretion.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.